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No. 85-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT C. HATCH and CLAUDIA R. HATCH
Petitioners,

vs.

RELIANCE INSURANCE COMPANY, a corporation,
Respondent.

RESPONDENT RELIANCE INSURANCE COMPANY'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in dismissing petitioner's claim on five separate grounds, each of which, as held by the United States Court of Appeals for the 9th Circuit, constituted a proper, independent and sufficient basis for dismissal?

2. May federal court jurisdiction in this matter be defeated by petitioners' attempted placement before this Court of an outside-the-record document and patently erroneous arguments based on that outside-the-record document?

3. Is respondent herein entitled to sanctions against petitioners and petitioners' counsel pursuant to the provisions of 28 U.S.C. § 1927 and Rule 49.2, Rules of the Supreme Court of the United States?

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RELEVANT STATUTORY PROVISIONS

Respondent requests relief in this matter pursuant to the provisions of 28 U.S.C. § 1927 which provides as follows:

> § 1927. Counsel's liability for excessive costs
>
> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

I. Prefatory Note:

This cause and a related predecessor action[1] involving the same parties have now been occupying court time for more than ten years. The instant Petition for Writ of Certiorari represents the third time that the petitioners and their counsel have petitioned

1. The federal interpleader action, Cause No. 77-834 in the United States District Court for the District of Arizona.

this Court for such relief. Petitioners have also prosecuted three appeals to the Ninth Circuit and have once unsuccessfully petitioned the Fifth Circuit for writ of mandamus. Petitioners have not prevailed on any aspect of their numerous prior petitions or appeals. Petitioners and their counsel continue to seek to relitigate the same issues over and over no matter how many times those issues are decided adversely to them. In the instant Petition before this Court, petitioners continue to set forth, as "facts," numerous contentions and issues which have long since been fully and finally decided adversely to them in prior proceedings. Petitioners seek to introduce new issues through the interjection of "evidence" and documents which are outside of the record. The result of such tactics is obfuscation and confusion of the facts, record and issues in this matter to the point of virtual unintelligibility.

Therefore, pursuant to Rule 34.2., Rules of the Supreme Court of the United States, respondent, being dissatisfied with petitioners' Statement of the Case, presents the following. Such is deemed necessary as a result of petitioners' gross mischaracterizations of the actions and rulings of the Courts below, and by their attempted interjection of documents outside of the record. Respondent presents the following chronology of relevant events in the hope and belief that it will assist this Court in clarifying and defining matters germane to the rulings of the District Courts in Texas and Arizona, and the Opinion of the 9th Circuit Court of Appeals affirming the District Court rulings.

II. Procedural Background and Chronology:

The procedural history of this matter is set forth in the Court of Appeals Opinion and need not be repeated herein. The Complaint brought by petitioners in the case at bench is set forth as Appendix R to their Petition. As noted by the Court of Appeals, the instant lawsuit was filed by petitioners in the face of a federal court order enjoining the action (Appendix A-1, hereto), and represents an attempt by petitioners to relitigate matters which

had been fully and finally resolved in the prior federal interpleader action.

Approximately one month after this Court entered its Order denying rehearing of its denial of the petition for writ of certiorari in the earlier interpleader action, petitioners and their counsel, being displeased with the decisions of the federal courts, went back to the Galveston County court and filed a new "Petition", summoning respondent back into the Texas state courthouse and seeking to once again litigate petitioners' claims against respondent pertaining to the issuance of the commercial blanket fidelity bond. In addition to the attempted relitigation of the bond claims (which litigation had been permanently enjoined by the federal court's Injunction of March 6, 1978), petitioners' counsel added several new theories and requests for relief to his imaginative new Petition. In addition to the attempted relitigation of the original contentions which the petitioners had unsuccessfully litigated in the interpleader action, petitioners and their counsel sought the following additional relief in the Texas state court action: (1) to have the Texas court declare that the "interpleader proceedings and Orders by the federal courts are invalid and must be considered null and void and of no force or effect . . ." (See Petition, Paragraph 18) (Appendix R to Petitioners' brief); (2) to have the Texas court overrule all federal court rulings in the interpleader action on the basis that those rulings were "based on gross errors of law by the U.S. District Court" (Petition, Paragraph 21) which "errors" were "compounded by the [gross errors of] the U.S. Court of Appeals for the Ninth Circuit" (Petition, Paragraph 22); (3) to have the Texas court declare Rule 21 of the Rules of the U.S. Court of Appeals for the 9th Circuit to be unconstitutional and unenforceable (Petition, Paragraphs 22 and 23); (4) to have the Texas court determine that "the U.S. Supreme Court denies full judicial review promised by the U.S. Constitution and denies due process under the Fourteenth Amendment. [And therefore] the only available remedy for such injustice on the federal level is for the courts of the sovereign states of the union to reassert jurisdiction and grant review of

legal issues [notwithstanding the prior rulings on these issues by the federal courts,]" (Petition, Paragraph 24); (5) to obtain a ruling that respondent, by virtue of having invoked the federal interpleader remedy, was liable to petitioners for "abuse of process" (Petition, Paragraph 29); and (6) to obtain a ruling that respondent was liable to all trustors of Heritage, in tort, because it negligently failed to investigate Heritage before issuing the bond and because it negligently failed to discover that Heritage was misrepresenting the scope and coverage of the bond to prospective investors (Petition, Paragraphs 33, 35 and 36.). It should be noted that the alleged tort claims, alleged by petitioners on their own behalf and on behalf of the supposed "class" of trustors, are the identical claims which were litigated and resolved by the Receiver, on behalf of all trustors, in the earlier interpleader proceeding. (Opinion, pp. 12,13) As a result of the filing of this Complaint, in violation of the federal court injunction, petitioners' counsel was held in contempt by Judge Valdemar A. Cordova, Judge of the United States District Court for the District of Arizona, and was ordered to forthwith amend his Complaint to remove all matters which were in violation of the permanent injunction.

Petitioners' strident efforts to avoid removal of the new Texas action to federal court are noted by the Court of Appeals. (Opinion, p. 8) Petitioners filed numerous documents in opposition to removal, including various motions seeking dismissal of the petition for removal and seeking remand of the cause to state court. On June 29, 1983, the Honorable Hugh Gibson, United States District Court Judge for the Southern District of Texas, entered his Order confirming that the removal of the cause to federal court was proper, and denying petitioners' various motions for dismissal and remand to the Texas state court. (Appendix A-2) On the same date, Judge Gibson entered Orders (1) transferring venue of this cause to the District Court for Arizona (Appendix A-3), and (2) denying a motion by petitioners to join a non-diverse defendant (in an attempt to defeat diversity jurisdiction), and ordering petitioners to file an amended complaint within 10

days, excising all contemptuous counts. (Appendix A-4). Notwithstanding this Order from Judge Gibson, and the earlier Order of Judge Cordova, petitioners never filed the required amended pleadings. (Opinion, p. 11)

Petitioners sought relief from Judge Gibson's Orders by Petition for Writ of Mandamus to the 5th Circuit, Petition for En Banc Rehearing after the 5th Circuit denial of mandamus, and Petition for Writ of Certiorari to this Court, all of which were denied.

For nine months petitioners did nothing with respect to the prosecution of the transferred action in the Arizona District Court. On March 27, 1984, the court issued its *sua sponte* Order wherein it noted that "although named plaintiffs and their counsel purport to represent a class consisting of 'Trustors of Heritage Trust Company', a request to certify the class pursuant to Rule 23 (c)(1) Federal Rules of Civil Procedure, has never been made nor such an order entered." (Appendix A-5)

Thereafter on April 9, 1984, petitioners' counsel filed a Motion to Designate Class and Certify Class, by which he sought certification of petitioners' claims as a class action and further sought to have petitioners designated as class representatives. At no time prior to this had petitioners sought to have this matter certified—not in state court or federal court. Petitioners' claims that the claim had been "accepted" as a class action by the state court are simply untrue. Petitioners' contention that they represent anyone other than themselves is based solely upon the fact that they filed a complaint which contains a caption containing their names along with the further designation "Trustors of Heritage Trust Company," and, by the allegations contained therein, petitioners sought to relitigate, on behalf of the trustors, the claims already resolved in the federal interpleader action.

On April 16, 1984, respondent filed its Motion to Dismiss and its Response to petitioners' Motion for Certification of the matter as a class action. Petitioners responded to the Motion to Dismiss and both motions were set for hearing on April 30, 1984, along with a pending discovery motion whereby petitioners' counsel was

seeking to force the state court Receiver to provide him with a list of trustors so that he could solicit plaintiffs for his alleged "class." After hearing argument on all issues, the Hon. William P. Copple, United States District Court Judge, District of Arizona, indicated on the record that, in light of the involved procedural history in this matter, and due to its interrelationship with the earlier interpleader action, he had reviewed the entire history of this matter, including the entire file in the earlier interpleader action. In ruling on the several motions, Judge Copple stated:

> THE COURT: Well, I have read the file in the interpleader action, Reliance versus Koeb, which was before Judge Cordova; the contempt proceedings against Mr. Cumming. I have read the pleadings in this case, including the memorandum by Mr. Cumming in support of the motion to remand in Judge Gibson's court in Texas. I have read the memorandum in his unsuccessful appeal to the Fifth Circuit from the ruling from Judge Gibson. I have read the memorandum in support of his petition for cert. to the United States Supreme Court, which was denied.
>
> I find that Mr. Cumming has some very original and unique ideas about res judicata and the relationship of federal and state courts and the supremacy clause of the Constitution, which brings me to the motion to designate a class action and to certify the class.
>
> Rule 23(c) requires that I make a finding that the named plaintiffs and their counsel will adequately represent the class.
>
> In this particular case, after reviewing all of the documents filed by Mr. Cumming, the proceedings before Judge Cordova, I have to find that, because of the total incompetency of counsel, the named plaintiffs cannot adequately represent the class and, therefore, I must deny certification of the class, even should such class exist, and I'm not sure it does.
>
> And I think all of the actions by the class in tort are barred by the statute of limitations, anyway.
>
> * * *

> And as to the motion to dismiss, the actions are barred by [petitioners' counsel's] failure to purge himself of contempt and to file, as ordered by Judge Gibson, an amended complaint; barred by the statute of limitations in tort; barred by res judicata; barred because it fails to state a legal claim and failure to be a plain, simple statement of the facts as required by Rule 8 of the Federal Rules of Civil Procedure as to both the proposed complaint which he never filed, although having been ordered to do so, and the complaint which was filed in contempt of court in Texas.
>
> Therefore, the clerk will enter judgment dismissing the complaint and action in all respects, the entire case, with prejudice.

A formal order was subsequently entered dismissing the cause and the petitioners appealed to the Ninth Circuit Court of Appeals.

Petitioners renewed their arguments relating to the propriety of the removal in their opening Brief before the Ninth Circuit. At no time, however, did petitioners ever argue or even suggest, either in the Texas or Arizona District Courts, or in the Opening Brief in the Court of Appeals, that there existed any issue relating to the "amount in controversy" requirement of 28 U.S.C. § 1332.

As noted in the Court of Appeals Opinion, petitioners, in their Reply Brief, made an assertion that the $10,000 amount in controversy requirement was not met in this matter. This was the first time any such an assertion had been raised. (Opinion, footnote 1.) Petitioners do not argue that their claim does not meet the jurisdictional amount requirement, for clearly it does. Rather, they assert that the claims of some of the members of the alleged "class" which they purport to represent, are less than the required $10,000. In an effort to give substance to this argument, petitioners inserted into their Reply Brief in the Court of Appeals, a document, created by petitioners' counsel, which was totally outside of the record in this proceeding. By this document, petitioners claim to establish that the supposed claims of some members of the alleged class are less than $10,000. For

reasons discussed, *infra,* petitioners' argument not only reaches outside the record—it is based upon totally spurious legal and factual analysis.

Petitioners' newly derived "amount in controversy" argument was rejected by the Ninth Circuit, as were their numerous other assignments of error relating to both the propriety of the removal and the propriety of the dismissal. The Court of Appeals further assessed costs and attorneys' fees against petitioners and their counsel, noting that their appeal was frivolous and that the entire proceeding constituted a gross abuse of the litigation process:

> This litigation has been ongoing for more than nine years. By filing this case in the Texas state court, by maintaining it in the federal district court, and by taking and prosecuting this appeal, appellants' counsel has grossly abused the judicial process. Appellants' counsel's persistent attempts to relitigate matters previously and finally determined demonstrate either a lack of understanding or a flagrant disregard of fundamental principles of res judicata and federalism. Counsel has ignored prior court orders and the Federal Rules of Procedure. Appellees have expended large amounts of time and money defending against the numerous and poorly drafted pleadings filed by appellants in this and related proceedings. The right of these defendants to be free from this costly litigation and the rights of other litigants must be considered. The instant appeal is frivolous.

(Opinion, pp. 15-16)

Petitioners continue the process by seeking intervention of this Court, by Petition for Certiorari filed on October 11, 1985.

SUMMARY OF ARGUMENT

The district court based its dismissal of petitioners' action on five separate and independent grounds. As held by the Court of Appeals, any one of the five grounds cited by the district court would have been sufficient to sustain the dismissal. In this case, *each* of the five grounds cited by the district court provided an

independent, proper and sufficient basis for dismissal. (Opinion, p. 10)

By their complaint in the Texas state court, petitioners sought to have the prior rulings of Arizona District Court, the Ninth Circuit Court of Appeals, and of this, the United States Supreme Court, declared "null and void", and asked that the state court "reassert jurisdiction" over those matters which had previously been fully and finally decided in the prior federal court proceeding. Petitioners further sought, by their complaint, to relitigate those matters decided adversely to them by the federal courts in the earlier interpleader action. The complaint seeks specified compensatory damages, "in excess of $7,000,000," plus unspecified punitive damages, additional compensatory damages, and attorney's fees. The matter was properly removed from the Texas state court to the federal court pursant to 28 U.S.C. § 1441.

Petitioners' argument that the "amount in controversy" requirement has not been met is both meritless and improper. Not only is petitioners' argument based on a self-created, outside-the-record document, it is based on patently erroneous factual and legal analysis. Further, and as held by the District Court and affirmed by the Court of Appeals, there exists no "class" and there exist no claims to be made on behalf of any supposed members of the alleged class.

The existence of federal jurisdiction is a matter of federal, and not state, law. In order to divest the federal courts of jurisdiction, petitioners would be required to demonstrate to a legal certainty, that the subject claim does not meet the jurisdictional requisite. Petitioners make no showing which even approaches this standard. Petitioners may not assert sham, false or merely colorable claims in order to defeat diversity jurisdiction. The determination of facts regarding jurisdictional questions, when those questions, are properly raised, are to be decided by the federal court.

Respondent respectfully urges that petitioners' action in filing the instant Petition for Writ of Certiorari is frivolous and that Respondent is entitled to sanctions pursuant to Rule 49.2, Rules

of the Supreme Court of the United States, 28 U.S.C. § 1927, and pursuant to the inherent powers of this Court.

ARGUMENT

I. The Decision of the Court of Appeals, Affirming the District Court's Dismissal of Petitioners' Action, Is Proper.

Petitioners advise this Court that the dismissal of their action by the Arizona District Court and the affirmance of that dismissal by the Court of Appeals is due to a "peculiar animus" and "injudicious hostility" which those courts have exhibited against petitioners. This is nonsense. Petitioners offer absolutely no legal or factual analysis suggesting that the dismissal of their cause was improper. To the contrary, and as noted by the Court of Appeals in its Opinion, affirmance of the dismissal would have been required if any *one* of the five grounds cited by the district court was supported by the record. The court held that *each* of the separate grounds relied upon by the district court provided an independent, proper and sufficient ground for dismissal. We will not unduly lengthen this Brief by repeating the cogent recitation and analysis of those issues which are set forth in the panel's Opinion.

II. The Cause Was Properly Removed to Federal Court; Petitioners' Arguments Regarding "Amount In Controversy" Are Both Frivolous and Improper.

This matter was removed from the Galveston County Court to the federal district court in Texas pursuant to 28 U.S.C. § 1441. Petitioners vehemently contested the propriety of that removal in both the Texas District Court (including a petition for writ of mandamus to the Fifth Circuit and a prior petition for writ of certiorari to this Court), and in their Opening Brief in the Ninth Circuit. The propriety of the removal was thoroughly analyzed and discussed in Judge Gibson's Order denying petitioners' motion for remand (Appendix A-4) and in the Opinion of the Court of Appeals.

At the Reply Brief level in the Court of Appeals, counsel for petitioners raised, for the first time, an argument relating to the amount in controversy. This argument appears to have become their primary focus in the instant Petition for Writ of Certiorari. Petitioners assert that, although their complaint seeks compensatory damages in excess of seven milion dollars, plus punitive damages, attorney's fees and costs incurred in prior proceedings, and "other actual compensatory and special damages," the requirement that the amount in controversy exceed $10,000 has not been satisfied Petitioners do not argue that their own claim does not meet the $10,000 requisite. Rather, they argue that the supposed claims of some of the members of their alleged "class" do not reach this jurisdictional threshold.

The argument fails on a number of grounds:

(1) There is no "class" of trustors. The action was never certified as a class action in the Texas state court or in the federal courts. When petitioners finally sought class certification, it was denied. Petitioners and their counsel do not now, and have never at any time represented anyone other than themselves.

(2) The claims which petitioners purport to bring on behalf of the alleged class of trustors were already litigated on behalf of the trustors by the Receiver in the earlier interpleader action. As noted by the Court of Appeals in affirming dismissal of petitioners' action on res judicata grounds:

> The tort claims alleged by appellants were pleaded, litigated and resolved in the federal interpleader action. Those matters may not now be relitigated.

(Opinion, p. 12)

Thus, there exists no class and there exist no claims.

(3) Even if one were to ignore the above, the obvious fact is that any claim which any trustor conceivably could have had out of the events in question, would have long since been time-barred. (Opinion, p. 11) It has now been more than 11 years since the subject fidelity bond was cancelled. With the exception of the tort claims made by the Receiver in the interpleader action on behalf of all trustors, there has never been any claim or even

inquiry from any trustor relating to any potential claim on the bond or against respondent, other than petitioners' perpetual litigative assault. It is difficult to conceive of any basis for petitioners' claim that they represent some unknown but actual class of persons with viable claims. Obviously, they do not. Yet they come before this Court, claiming not only to represent such unknown persons, but also claim that these unknown persons with unknown but somehow viable claims divest the federal courts of diversity jurisdiction.

Petitioners further purport to "prove" that the alleged claims of the members of this supposed class of trustors do not meet the jurisdictional minimum with an interesting piece of factual and legal analysis: Petitioners' counsel has taken certain information contained in two reports prepared by the Receiver in the Arizona state court receivership proceeding and has modified those reports by his own interpretive notations, and attempted to place this self-created document before the appellate courts by inserting it into petitioners' Reply Brief at the Court of Appeals. The document is not a part of the record in this proceeding, and, as was noted at oral argument at the Court of Appeals, its attempted insertion into the appellate record is patently and grossly improper.

Before this court, petitioners argue that their self-created document "proves" that the supposed claims of the alleged class of trustors average less than $10,000 each. In addition to going outside the record, petitioners' argument is fraught with patently erroneous analysis. Simply stated, what petitioners have done is to extract a page from a Receiver's report, which page dealt with certain investments made by Heritage Trust Company in ventures which were denominated as "83 Accounts." Petitioners' counsel then totaled the column which he has designated as "Loss Amounts from Trusts," and has totaled the column which he has entitled "Total Number of Investors." He then divided the sum of the "Loss Amounts" column by the sum of the "Number of Investors" column, and instructs the Court that, since this process yields a quotient of $4,538, this "proves" that the claims of his

imaginary class of plaintiffs do not equal $10,000. Therefore, he argues, diversity jurisdiction is destroyed.

We set aside the fundamental facts that there is no class of plaintiffs, and that there are no extant claims, and address the blatant fallacies of petitioners' analysis:

(1) only approximately 500 Heritage trustors had funds placed, by Heritage, in the "83 Accounts." Note, however, that when the columns of "Total Number of Investors" are added, the sum is 1,782 and this is the number which petitioners' counsel used as the divisor in his "proof" that the supposed claims of the individual trustors must be less than $10,000. But there were not 1,782 different trustors involved in "83 Accounts"—as stated above, there were only approximately 500. The mathematical explanation for this is apparent—a single investor's money was usually divided among numerous "83 Accounts." As a hypothetical example, if a single trustor placed $15,000 with Heritage for investment, Heritage might take that $15,000 and invest in numerous different ventures—perhaps $3,000 would be invested in each of five different "83 Account" ventures, or $1,500 would be placed in each of ten different "83 Account" ventures. That same single trustor would then show up, respectively, as five or ten different trustors in petitioners' calculations. In the former example, he would show up as 5 different investors, each having a $3,000 average loss. In the latter, this single trustor would show up as 10 different investors, each with an average loss of $1,500. But, of course, he is neither—he is one investor with a $15,000 loss.

(2) A second fallacy in petitioners' calculations is that losses sustained by trustors in the "83 Accounts" do not represent all losses sustained in the Heritage failure. Additional losses totalling approximately $4,000,000 (per the Receiver) were sustained in matter separate and apart from the investments in "83 Accounts." Thus, if we again take the hypothetical trustor, who, on a given occasion invested $15,000 with Heritage, it may well be that only a portion of those funds were placed in the "83

Accounts." $5,000 may have been diverted to some other purpose while $10,000 was placed in various "83 Accounts." Thus, the column designated "total loss of trustors" as calculated by petitioners' counsel in his "proof" is also fallacious. That number represents only the total of funds placed in the "83 Accounts." Not only is the divisor in petitioners' calculation in error, so is the dividend. Petitioners have divided a meaningless number by a meaningless number, and have thereby arrived at a quotient which they contend defeats federal jurisdiction and mandates remand.

(3) In addition to the above, the Court may note that several of the "Loss Amounts," as designated in petitioners' self-created document, are shown as "not reported" or are simply left blank. Do petitioners not recognize that such omissions, separate and apart from the other errors, render their calculation meaningless?

(4) In petitioners' pleadings, and throughout these proceedings, petitioners have claimed damages, not only for amounts alleged to have been lost by petitioners and the supposed class of trustors through Heritage investment practices, but also have claimed numerous additional "actual compensatory and special damages," "exemplary damages for fraud, malice, misrepresentation and negligence by Reliance," and, as additional compensatory damages, have made claim for attorney's fees, costs, and expenses incurred, *not* in the instant matter but in the prior federal interpleader action. Such claims would properly be included in computing a jurisdictional amount. Wright, Miller & Cooper 14A, *Federal Practice and Procedure:* Jurisdiction 2d § 3712 at p. 175. Their claim to punitive or exemplary damages would also be considered. *Bell* v. *Prefered Life Assur. Soc. of Montgomery, Ala.*, 320 U.S. 238 (1943); *Loss* v. *Blankenship*, 673 F.2d 942 (7th Cir. 1982). Yet these additional claims of damage, each of which is set forth in petitioners' complaint, are unmentioned and unaccounted for in the mathematical exercise presented by petitioners in their Petition.

The above matters are set forth to demonstrate the absurdity of petitioners' contention that they have established, by placing an

outside-the-record document before the Court and arguing therefrom, that there is an extant class of plaintiffs with viable claims that defeat federal jurisdiction. By no stretch could this presentation be said to meet the required "legal certainty" standard to divest the Court of jurisdiction. Wright, Miller & Cooper 14A, *Federal Practice and Procedure,* Jurisdiction 2d § 3702 at pp. 48, 49.

It has long been the law that in determining whether a basis for federal diversity jurisdiction exists, the Court looks to the claims set forth in plaintiffs' complaint. To justify dismissal or remand, it must appear to a *legal certainty* that the claim is for less than the requisite jurisdictional amount. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283 (1938); Wright, Miller & Cooper 14A, *Federal Practice and Procedure,* Jurisdiction 2d § 3702 at pp. 12-16. Once removal jurisdiction attaches, machinations by the plaintiffs to reduce the claim to less than the jurisdiction requisite cannot operate to oust the court of jurisdiciton. *St. Paul Indemnity Co.* v. *Red Cab Co., supra* at p. 292.

In the instant case, petitioners filed their complaint alleging claims for more than $7,000,000 in compensatory damages and additionally claimed punitive damages, attorney's fees, and other general damages. They further requested that the state court declare all prior federal court actions, decisions and procedures to be null and void and requested that said state court "reassert jurisdiction" over those matters which had been decided adversely to them in the prior proceedings in the federal courts. Finally, petitioners purported to bring this multimillion dollar action on behalf of themselves and an alleged class consisting of "trustors of Heritage Trust Company."

The petitioners and their counsel do not now, nor have they ever, represented any "trustor" other than themselves. Moreover, and as determined by both the district court and the Court of Appeals, the claims which petitioners purport to bring on behalf of the trustors were fully and finally litigated and resolved in the interpleader action. (Opinion, p. 13) Additionally, and even if one were to ignore the bar of res judicata, the supposed

claims of any and all trustors would be long since barred by limitations. (Opinion, p. 11)

The existence of federal jurisdiction is a question of federal, not state, law. *Kramer* v. *Carribean Mills, Inc.*, 394 U.S. 823 (1969). Facts necessary to a determination of removal jurisdiction are to be considered by the federal court and not by the state court. *Gentle* v. *Lamb-Weston, Inc.*, 302 F.Supp. 161, 166 (1969), *citing, Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921); Wright, Miller & Cooper 14A, *Federal Practice and Procedure*, Jurisdiction 2d, § 3701 at p. 23. Once a removal petition is filed, the federal court must determine whether the claims actually at issue meet jurisdictional requirements. A litigant may neither create nor defeat diversity jurisdiction by the mere inclusion of sham claims or merely "colorable" claims in his complaint. *Columbia Pictures Corporation* v. *Grengs*, 257 F.2d 45 (7th Cir. 1958); *Emland Builders, Inc.* v. *Shea*, 359 F.2d 927 (10th Cir. 1966).

In the instant matter, the removal petition properly set forth that "The amount in controversy, exclusive of interests and costs, exceeds $10,000." Petitioners argue that this somehow constitutes improper pleading of this jurisdictional fact. *Moore's Federal Practice*, however, notes that this is the precise manner in which this jurisdictional fact should be alleged:

> In diversity cases, the allegation should be substantially as follows:
>
> "The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars."
>
> This constitutes good pleading of this jurisdictional fact. (citing cases)
>
> 1 Moore's Federal Practice
> ¶ 0.92 [1] at pp. 860-861

The allegations set forth in respondent's removal petition regarding the "amount in controversy" were never challenged by petitioners, and were thus deemed true:

> Inasmuch as the jurisdictional facts alleged in the removal petition and those otherwise disclosed by the record constitute the basis for federal jurisdiction, if the petition affirmatively shows on its face the necessary jurisdictional facts and these are not contradicted by the record, the motion to remand must challenge these allegations or they will be deemed true. Thus a motion to remand which fails to put in issue the averments of the petition raises only the legal sufficiency of the factual allegations and the party seeking removal is not required to furnish proof of the allegations. If, however, plaintiff properly takes issue with a material allegation of defendant's petition for removal, the issue so arising must be heard and determined *by the federal district court.*
>
> 1A Moore's Federal Practice
> ¶ 0.168 [4-1] at pp. 645-646 (emphasis supplied)

When petitioners sought to obtain class certification, and to obtain designation as class representatives, they were denied. In denying petitioners' request, the district court noted not only the incompetency of counsel and its (the court's) doubts as to whether any "class" existed, but also held that the claims which petitioners were purporting to bring on behalf of the supposed class had already been fully and finally adjudicated in the earlier interpleader action. The court further observed that the alleged claims were barred by limitations. These rulings were affirmed on appeal. We now have petitioners coming before this Court, claiming that the federal courts have been divested of jurisdiction on the basis of the patently incorrect mathematical analysis based on an outside-the-record document. Petitioners' arguments may fairly be characterized as frivolous.

It has frequently been observed that the federal courts should be alert to protect their diversity jurisdiction against maneuvers designed to defeat it. *Gentle* v. *Lamb-Weston, Inc.*, 302 F.Supp. 161, 165 (1969). Sham claims or merely "colorable" claims regarding simulated matters of controversy designed to either confer or defeat jurisdiction should not be tolerated. *Emland Builders, Inc.* v. *Shea*, 359 F.2d 927 (10th Cir. 1966); *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176 (1907).

The presence or addition of fictitious or unnamed parties to a suit cannot be used to divest the federal court of diversity jurisdiction. *Ward* v. *Connor*, 495 F.Supp. 434 (1980), rev'd on other grounds, 657 F.2d 45 (4th Cir. 1981), cert.den. 455 U.S. 907 (1982).

Gentle v. *Lamb-Weston, Inc., supra,* contains a particularly cogent analysis of this Court's past decisions relating to these matters:

> . . .
> . . .[M]oreover, in the years since 1887 the [U.S. Supreme] Court has condemned similar practices in a way which makes it clear that the federal courts should be alert to protect their [diversity] jurisdiction against cleverly-designed maneuvers designed by ingenious counsel to defeat it. Thus, in Ex parte Nebraska, 209 U.S.436, 28 S.Ct. 581, 52 L.Ed. 876 (1908), the Court refused to accept the appearance of the State of Nebraska as a party plaintiff and its allegation of an interest in the action as conclusive. Instead, the Court held that the federal circuit court properly refused to remand the case to the state court because, on an examination of the entire record, it was apparent that the State of Nebraska was a mere nominal party plaintiff with no substantial interest in the controversy. Likewise, in Wecker v. National Enameling and Stamping Co., 204 U.S. 176, 27 S.Ct. 184, 51 L.Ed. 430 (1907), the plaintiff, in a tort action, joined a codefendant for the express purpose of destroying diversity. Since the sham was apparent (because the codefendant could not conceivably have been liable), the Supreme Court affirmed the circuit court's refusal to remand to the state court. The court concludes its opinion with the following words of admonition, applicable here:
>
> > While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, *it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has the right and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.* (Emphasis the Court's)

302 F. Supp. at 164-165

Petitioners' contention that the federal district court and Ninth Circuit were without jurisdiction to make the determinations that no viable claim existed on behalf of the alleged class of trustors is simply wrong. *Kramer* v. *Carribean Mills, Inc.*, 394 U.S. 823 (1969). Again, *Gentle* v. *Lamb-Weston, Inc., supra,* addresses the point directly:

> Only one further comment is necessary. Plaintiffs strenuously argue that the state court is the proper forum to determine whether the assignments are invalid because they were made to defeat federal jurisdiction. [Citations omitted.] However, as the Supreme Court noted in Kramer v. Carribean Mills, Inc., *supra,* 395 U.S. at 829, 89 S.Ct. at 1490, "The existence of federal jurisdiction is a matter of federal, not state, law." Since all the facts relating to the assignments are before this Court, there is no necessity for remand to the state court for a determination as to their effect upon this Court's jurisdiction. *See* Wilson v. Republic Iron & Steel Co., *supra,* 257 U.S. at 97, 42 S.Ct. 35; Phoenix Mutual Life Ins. Co. v. England, *supra* 22 F.Supp. at 286; *see also* Lisenby v. Patz, *supra.* As Professor Moore has observed, "[I]f the federal courts will not protect their jurisdiction from fraudulent evasion it is not likely that state courts will do it for them." Moore, *supra,* 17.05[2] at 154.

302 F.Supp. at 166

In this case the federal courts, in making the relevant determinations, determined that no class exists and no viable claims exist.

III. Respondent's Request for Sanctions:

This matter has been in litigation for more than ten years. Petitioners have repeatedly ignored federal court orders and continue in their attempts to relitigate matters previously decided. They present jurisdictional arguments to this Court which are drawn from matters outside the record and proceed to present arguments based on those beyond the record documents which are patently and grossly erroneous, if not intentionally misleading.

Both the District Court and the Court of Appeals noted the gross abuse of the judicial process which has been perpetrated by petitioners and their counsel. Petitioners' counsel's response to this is to accuse Judge Copple, of the District Court, and Judges Duniway, Hug, and Skopil of the Court of Appeals of having a "peculiar animus" against petitioners and of "inflicting injudicious hostility" upon his clients and himself.

The Court of Appeals, in holding that petitioners' appeal was frivolous, noted that:

> Appellees have expended large amounts of time and money defending against the numerous and poorly drafted pleadings filed in this and related proceedings. The right of these defendants to be free from this costly litigation and the right of other litigants must be considered. The instant appeal is frivolous.

Petitioners have responded to this judicial admonition by instituting yet another costly appellate procedure. We respectfully request sanctions against petitioners and their counsel pursuant to Rule 49.2, Rules of the Supreme Court of the United States, pursuant to 28 U.S.C. § 1927, and pursuant to the inherent power of this Court. *Roadway Express, Inc.* v. *Piper,* 447 U.S. 752 (1980).

CONCLUSION

The District Court's dismissal was entirely proper. There exists no error of fact or law in either the District Court Order or the Court of Appeals Opinion.

Petitioners' 11th hour attempt to interject an issue as the "amount in controversy" requirement of 28 U.S.C. § 1332 is both improper and without merit. It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JENNINGS, KEPNER & HAUG

By JOHN R. CUNNINGHAM
800 Arizona Title Building
111 West Monroe Street
Phoenix, Arizona 85003

Attorneys for Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE COMPANY,
a corporation,

Plaintiff,

vs.

RICHARD W. KOEB, as Receiver for Heritage Trust Company; ROBERT C. HATCH and CLAUDIA R. HATCH, his wife; and WALTER C. MADSEN, Superintendent of Banks, State of Arizona,

Defendants.

CIV 77-843 PHX WEC

ORDER GRANTING PERMANENT INJUNCTION AND REQUIRING INTERPLEADER

This matter having come on regularly for hearing on the Court's Order for Issuance of Process, Injunction Against Interpleaded Claimants, and Hearing, dated the 1st day of November, 1977, requiring the defendants and each of them, to appear and show cause, if any they have, why they should not be required to interplead their claims in and to the sum deposited by the plaintiff with the Registry of this Court, and why the temporary injunction heretofore issued by this Court should not be made permanent.

And it appearing to the court that:

(1) The Court has jurisdiction of this cause under Title 28, U.S.C.A., Section 1335, to grant the relief requested.

(2) This is an action in the nature of Interpleader commenced under and by virtue of 28 U.S.C.A., Section 1335, the statutory requisites thereof having been duly satisfied.

(3) The Court's temporary injunction was duly entered pursuant to 28 U.S.C.A., Sections 1335 and 2361.

(4) The Court's order of November 15, 1977, dissolving the temporary injunction was entered without proper notice to opposing parties and an opportunity to be heard.

NOW, THEREFORE, IT IS ORDERED that the Court's Order of November 15, 1977, dissolving the temporary injunction may be, and the same is hereby vacated, and it is further

ORDERED that the defendants, and each of them, are hereby permanently enjoined and restrained from instituting or prosecuting, in any State court or in any United States court, any suit or proceeding on account of or pertaining to the liability of the Reliance Insurance Company on account of the issuance of its Bond No. B 729077 to Heritage Trust Company, or from continuing with the prosecution of any actions or any proceedings already instituted or commenced against the plaintiff, Reliance Insurance Company, in relation to such bond, and

IT IS FURTHER ORDERED that the defendants and each of them be and they are hereby required to interplead and relitigate among themselves and with plaintiff their claims in and to the sum of ONE MILLION DOLLARS ($1,000,000.00) evidenced by the Bond on Interpleader heretofore delivered by plaintiff to the Clerk of this Court.

DONE IN OPEN COURT this 6th day of March, 1978.

/s/ WALTER E. CRAIG

Walter E. Craig
United States District Judge

A-2.1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, *et al.*,

Plaintiffs,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

CIVIL ACTION NO. G-82-358

ORDER

BEFORE THE COURT are three motions and responses in opposition concerning the validity of the removal of this diversity action from state court. Although plaintiffs have buttressed their motion to dismiss and motion to remand with other arguments, principally their contention centers on the sufficiency of the jurisdictional allegation in the petition for removal. In pertinent part the petition appears lacking because it does not set forth when defendant, Reliance Insurance Company [Reliance], obtained its citizenship for the purposes of diversity jurisdiction. Defendant moves to amend its petition to set forth these details.

The Fifth Circuit has held that the failure to allege citizenship at the time the suit was brought and at the time the petition was filed is not fatally defective and may be cured by an amended petition, even at the appellate stage. *See D. J. McDuffie, Inc.* v. *Old Reliable Fire Insurance*, 608 F.2d 145, 146-47 (5th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980). *Accord Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Haydu*, 637 F.2d 391, 396 n.9 (5th Cir. 1981).

Hence, the Court finds that the removal petition should not be dismissed and that defendant's request to amend is entirely proper.

In addition, the Court rejects plaintiffs' other arguments as follows:

(1) Plaintiffs claim that this lawsuit is a continuation of a suit filed in 1977, and thus, defendant has waived its right to remove. In the 1977 lawsuit, plaintiffs attempted to garnish the proceeds of a bond issued by Reliance to Heritage Trust Company [Heritage], an Arizona investment company. Under the bond, Reliance agreed to indemnify Heritage for losses resulting from Heritage employee dishonesty. Plaintiffs had sued Heritage and its officers in 1975, alleging that the defendants had defrauded plaintiffs of their investment money. They won a default judgment in 1976. Seeking payment of that judgment, they then filed the garnishment proceeding. This lawsuit was drawn into a federal interpleader action filed by Reliance in Arizona. The interpleader was dismissed in 1982. Meanwhile, in 1981, the state garnishment proceeding was dismissed for want of prosecution. In 1983, after the filing of the action on this Court's docket, plaintiffs attempted to reinstate their garnishment proceeding but the state court, lacking any discretion to reinstate due to plaintiffs' delay, denied the motion. *See* Tex.R.Civ.P. 165(a).

The present lawsuit alleges factually related yet different claims than those upon which the garnishment was based. It is brought against Reliance rather than Heritage and basically alleges that Reliance conspired with Heritage to defraud plaintiffs and that Reliance's interpleader action amounted to an abuse of process. Upon review of the record, the Court finds no continuation of lawsuits, and, thus, the defendants timely removed this lawsuit.

(2) Plaintiffs claim that they recently have amended their complaint *in state court* to add a non-diverse, indispensable party. Section 1446(e) provides that upon removal "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. §1446(e). Even if removal is later found improper, state court proceedings after the filing of the removal petition will be vacated and are of no effect. 14 Wright & Miller, Federal Practice & Procedure §3737 at 7431-44 (1976). *See Perimeter*

Lighting, Inc. v. *Karlton,* 456 F.Supp. 355, 360 (N.D. Ga. 1978) (complaint filed in state court after removal petition filed "nct relevant" to determination of jurisdiction). Consequently, the alleged attempt by plaintiff to amend in state court (defendant disputes that the amendment has taken place), is ineffective to destroy diversity in this proceeding.

Accordingly, it is ORDERED, ADJUDGED and DECREED that

(1) plaintiffs' motion for dismissal of defendant's petition of removal and plaintiffs' motion to remand are DENIED; and

(2) defendant's motion for leave to file a second amended petition for removal is GRANTED.

DONE at Galveston, Texas, this the 29th day of June, 1983.

/s/ HUGH GIBSON

Hugh Gibson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, *et al.*,

Plaintiffs,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

CIVIL ACTION
No. G-82-358

ORDER

BEFORE THE COURT is defendant's motion for change of venue. *See* 28 U.S.C. § 1404(a). Defendant argues that the claims asserted herein arise in Arizona and that on balance the factors of convenience weigh in favor of transfer there. In opposition, plaintiffs argue that venue is proper in Texas. Having reviewed the record and applicable law, the Court concludes that venue is proper in Arizona and that a transfer of this action to Arizona would be proper.

A transfer under § 1404(a) required two findings—that the district is one where the action "might have been brought" and that the "convenience of parties and witnesses, in the interest of justice" favors transfer.

Venue of a diversity action is proper where the parties reside or where the claim arise. 28 U.S.C. § 1319(a). Plaintiffs reside in the Southern District of Texas, and, hence, venue is proper here. A corporation's residency for venue purposes is where it is incorporated, where it is doing business or is licensed to do business. 28 U.S.C. § 1391(c). Hence, Reliance Insurance Co. [Reliance] may claim residency at least in Pennsylvania, the state of its incorporation and principal place of business. The alleged

connection this case has with the District of Arizona is that the claims allegedly arose there.

Plaintiffs make the following three claims against Reliance: (1) that Reliance's filing of an interpleader action in Arizona federal court, which filing brought in the plaintiffs' then-pending Texas garnishment action, amounted to an abuse of process; (2) that by selling its insurance bond to Heritage Trust Co. [Heritage], Reliance conspired to defraud plaintiffs who, because of the bond, would be induced to invest in Heritage; and (3) that Reliance negligently issued the bond knowing that Heritage would use the existence of the bond to lure investors.

In determining whether venue is proper in Arizona, the Court is guided by two principles. First, federal law governs the determination of this question. *Sutain* v. *Shapiro & Liebe*[illegible] 678 F.2d 115, 117 (9th Cir. 1982). Second, where multiple claims are asserted, as in this case, venue must be proper for all. *See* 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3808 at 41 (1976).

The Fifth Circuit has commented that the legislative purpose of creating venue based upon where the claim arose,

> was to "facilitate the disposition of . . . claims by providing . . . a more convenient forum to the litigants and witnesses involved." H.R.Rep.No. 1893, 89th Cong., 2d Sess.2 (1966). Thus, "where the claim arose" should "be ascertained by advertence to events having operative significance in the case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records." *Lamont* v. *Haig*, 590 F.2d 1124, 1134 (D.C. Cir. 1978). This is not to suggest that only a single district can satisfy the statutory standard with respect to any given claim. Often, the factors deemed determinative might well indicate the suitability of several forums.

Florida Nursing Home Ass'n v. *Page*, 616 F.2d 1355, 1361 (5th Cir.) *cert. denied*, 449 U.S. 872 (1980), *rev'd on other grounds*, 450 U.S. 147 (1981) (citations omitted). *Accord Clayton* v. *Prudential Insurance Co. of America*, 554 F.Supp. 628, 631 (S.D. Tx. 1982); *Gurrola* v. *Griffin & Brand Sales Agency, Inc.*,

524 F.Supp. 113, 116-117 (S.D. Tx. 1980) (aggregate of opertive facts).

After a thorough and commonsense review of this record, the Court concludes that the operative facts or events in large part took place in Arizona. Heritage operated in Arizona. The bond transaction apparently transpired there. The interpleader and subsequent, related litigation was begun and resolved there. Thus, numerous witnesses and documents relating to plaintiffs' claims are located in that state. Plaintiffs, on the other hand, have not indicated what witnesses or documents are located within Texas. Although plaintiffs may have relied on Heritage's solicitation in Texas and they may have been served with process for the interpleader in Texas, these facts, at best, suggest an alternative district where the claims arose. *See Florida Nursing Home, supra* at 1361. However, the Court finds that, on balance, the "events having operative significance" took place in Arizona, and, thus, venue is proper there.

Between Arizona and Texas, the court concludes that the more convenient venue would be the Arizona district. Plaintiffs choice of forum is but one factor that the Court must consider. In this case, other factors, such as the location of identified witnesses and documents, weigh heavily in favor of transfer.

Accordingly, it is ORDERED, ADJUDGED and DECREED that

(1) defendant's motion for change of venue is GRANTED;

(2) this action is hereby TRANSFERRED to the United States District Court for the District of Arizona, sitting in Phoenix, Arizona; and

(3) the records and papers now on file in this action in the office of the Clerk of this Court shall be transmitted by the Clerk to the Clerk of the United States District Court for the District of Arizona, sitting in Phoenix, Arizona, to be filed in that office.

DONE at Galveston, Texas, this the 29th day of June, 1983.

/s/ HUGH GIBSON

Hugh Gibson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, *et al.*,

Plaintiffs,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

CIVIL ACTION No. G-82-358

ORDER

BEFORE THE COURT is plaintiffs' motion to amend their complaint. The proposed second amended complaint seeks to add a non-diverse party defendant and to allege causes of action which are not in contempt of court order. Defendant is opposed to plaintiffs' attempt to add the non-diverse party.

Heritage Trust Co. [Heritage] was an investment trust company, owned and controlled by John R. Bromley and his wife. In the early '70's, Reliance Insurance Co. [Reliance] issued a bond to Heritage, agreeing to indemnify Heritage for losses due to Heritage employee dishonesty. When claimants, such as the Hatch plaintiffs, filed competing claims to the bond money, Reliance filed an interpleader action in Arizona federal court. As part of the interpleader, the Arizona district court permanently enjoined the prosecution or institution of actions relating to Reliance's issuance of its bond. Although the interpleader was dismissed in 1982, the Arizona court found portions of the original complaint filed herein in contempt of its injunction.

This action was filed in state court and removed to this Court which has subject matter jurisdiction by virtue of diversity of citizenship. Plaintiffs are Texas residents and defendant Reliance Insurance Company is a Pennsylvania corporation.

Plaintiffs propose to add Bromley, a Texas resident, as a co-conspirator. As justification for the addition, plaintiffs assert they can obtain his testimony more easily if he is a party than if he is not.

The original complaint, in those counts not in contempt of the Arizona court order, alleged against Reliance that an interpleader action filed by Reliance was an abuse of process, that Reliance conspired with Heritage to defraud Heritage investors, and that Reliance negligently issued its bond of indemnification to Heritage. In their proposed amended complaint, plaintiffs have alleged only those counts; thus in that respect, the Court finds the amendment proper.

If a removed lawsuit comes within a federal court's subject matter jurisdiction when it is removed, a plaintiff generally is not allowed to change his petition to defeat jurisdiction. *See St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938) (jurisdictional amount). *See generally* 14 Wright & Cooper, Federal Practice & Procedure §3723, at 598-99 (1976).

Regarding the addition of non-diverse parties, if, on the one hand, they are indispensable parties, the court must join them and remand would be proper. *See Jeff* v. *Zink*, 362 F.2d 723, 726 (5th Cir.), *cert denied*, 385 U.S. 987 (1966); *Hilton* v. *Atlantic Richfield*, 327 F.2d 217, 219 (1964). *See Stanhope* v. *Ford Motor Credit Co.*, 483 F.2d 275, 277 (W.D. Ark. 1980). On the other hand, the Fifth Circuit has stated that joinder and remand of not indispensable parties is "clearly improper." *In re Merrimack Mutual Fire Insurance Co.*, 587 F.2d 642, 647 (5th Cir. 1978). *Accord* 1A Moore, *Federal Practice* ¶0.161[1], at 209 (2d ed. 1982). Thus, the critical question is whether Bromley is an indispensable party.

Co-conspirators are not indispensable parties. *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 463 (1945); *Herpich* v. *Wallace*, 430 F.2d 792, 817 (5th Cir. 1970); *Professional Investors Life Insurance Co.* v. *Roussel*, 528 F.Supp., 391, 404 (D. Kan. 1981).

As an alleged conspirator, Bromley is not indispensable; hence, jurisdiction having been properly established in this Court, the Court finds that joinder of Bromley and the resulting remand would be improper. Thus, in this respect, the Court finds the proposed amended complaint improper.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiffs' motion to amend is GRANTED in part and DENIED in part; plaintiffs' motion to add John R. Bromley as party defendant is DENIED; plaintiffs' motion to amend the complaint so that it comports with the prior court order is GRANTED; and plaintiffs have ten (10) days to file an amended complaint without adding parties defendant, unless prior permission of the Court is obtained.

DONE at Galveston, Texas, this the 29th day of June, 1983.

/s/ HUGH GIBSON

Hugh Gibson
United States District Judge

A-5.1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT C. HATCH, *et al.*,

Plaintiff,

vs.

RELIANCE INSURANCE COMPANY,

Defendant.

No. Civ. 83-1266 Phx. WPC

ORDER

Counsel for plaintiffs has filed a motion for order to produce documents directed at a non-party. The Court notes that although named plaintiffs and their counsel purport to represent a class consisting of "Trustors of Heritage Trust Company", a request to certify the class pursuant to Rule 23(c)(1) F.R.Civ.P. has never been made nor such an order entered.

IT IS ORDERED:

The Court will hear arguments on both issues at 10:00 A.M. Monday, April 30, 1984.

/s/ WM. P. COPPLE

Wm. P. Copple
United States District Judge

Mailed this 27th day of March, 1984, to:
Counsel